Liability of Landowners for Pollution of Percolating Waters

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COMMENTS

LIABILITY OF LANDOWNER FOR POLLUTION OF PERCOLATING WATERS

In recent years it has become apparent that a great migration is taking place from the cities to the small suburban areas which lie at the edges of the cities. Large undeveloped tracts of land beyond the limits of the city have been opened to both residential and industrial use. In many cases, for reasons financial or political, the cities have been unable or unwilling to extend their ancient and often overburdened water and sewage disposal facilities to these areas. Lacking the degree of community organization necessary to construct their own systems, the new subdivisions and developments have constructed private wells and septic tanks to an unprecedented extent. It requires no great imagination to foretell that, in some instances, septic tank seepage may pollute the soils and rock strata surrounding the tank with harmful bacteria or noxious substances, that the underground waters which percolate through such soils may be similarly polluted, and that costly and often irreparable consequences might attend the pollution of wells supplied by such waters. Even the most rigid enforcement of health controls may well prove inadequate to meet the problem, for it is hardly to be expected that last-century regulations can control the new migration.

Percolating waters have been properly defined as

...those which ooze, seep, or filter through the soil beneath the surface, without a defined channel, or in a course that is unknown and not discoverable from surface indications without excavation for that purpose.  

Artesian waters have been held to be percolating waters. It is assumed that a well is filled from percolating waters unless there is proof to the contrary by clear and convincing evidence.

Upon discovering that his well has become polluted, the injured party has available, as possible theories of action, the whole spectrum

1 United Fuel Gas Co. v. Sawyer, 259 S.W.2d 466 (Ky. 1925). They have been defined also in the common law sense as vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance. City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755 (1909).

2 Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903); Katz v. Walkinshaw, 141 Cal. 116, 74 Pac. 766 (1903); Erickson v. Crookston Waterworks, Power & Light Co., 100 Minn. 481, 111 N.W. 391 (1907).

of trespass, negligence, nuisance and strict liability, but may be faced, in some jurisdictions, by a denial of any legally-protected right to unpolluted percolating water. The merits of each theory shall be taken up individually, but we shall first examine the question of the legal recognition of the right itself.

A. Right To Undefiled Waters—Denied

This classification has generally become known as *damnnum absque injuria*. Literally, the phrase means a loss without an injury, and in legal contemplation has come to mean an injury without legal redress. The doctrine goes back to the English case of *Acton v. Blundell* which held,

... the person who owns the surface may dig therein and apply all that is there found to his own purpose at his free will and pleasure; and that if in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnnum absque injuria* which can become the ground of an action.

This principle found its way into American jurisprudence in the case of *Brown v. Illius* in 1857. The startling point is that, while this case serves as the leading case for the theory of *damnnum absque injuria* as applied to percolating water pollution, it involves not percolating waters but surface waters. The court said by way of dicta that the trial court was correct in its instructions that the defendant was not guilty of negligence in producing the injury, in that he had

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6 For a discussion of the historical basis of this aspect, see *Rose v. Socony-Vacuum Corp.*, 54 R.I. 411, 173 Atl. 627 (1934); *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N.W. 925 (1894); and, *Swift & Co. v. Peoples Coal & Oil Co.*, 121 Conn. 579, 186 Atl. 629 (1936).
7 *Supra*, note 4.
8 Plaintiff used the water from his well to run a steam engine and as drinking water for his workers. Defendant, who lived within close proximity of the plaintiff's well, deposited noxious matter on the ground which was later washed into plaintiff's well by surface waters. The trial court instructed the jury as follows: "You will inquire by what mode the well became affected; whether the noxious substances filtered through the earth to the well, in consequence of ordinary rains, in the usual mode of the spreading of such substances, without corrupting the underground water course that supplied the same; or whether they filtered through the earth and corrupted the underground water course that supplied the well, and in that mode, and that only, spoiled the same. If the well was corrupted in that mode, it is difficult to see how the defendant could be guilty of negligence in corrupting the same. He had no means of knowing that the water course was there. No prudence could guard against such a result, and without negligence the defendant would not be liable. But the plaintiffs claim that soon after the mischief began, they complained to the defendant respecting it. This is not denied by the defendant. You will then inquire, whether the exercise of such care as I have described would have prevented a continuance of the mischief. If it would, the defendant was at fault in that he did not exercise such care, providing he did not, and for the injury resulting from such neglect (if any) he is responsible."
no means of knowing that the water course was there, but was wrong in holding that "if after receiving this information, he could have prevented a continuance of the injury by the use of reasonable care, he was liable for damages resulting."\(^9\)

The real philosophy behind the doctrine was clearly and succinctly set out in *Upjohn v. Board of Health of Richland*.\(^{10}\) In it Justice Cooley says:

> But if withdrawing the water from one’s well by an excavation on adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure, and no negligence. The one act destroys the well, and the other does no more; the injury is the same in kind and degree in the two cases.

The first case which was decided directly upon the question of liability for pollution of percolating waters as such was *Dillon v. Acme Oil Co.*\(^{11}\) Here the defendant had had occasional leaking and spilling of acids, chemicals and refuse water which had saturated the ground and percolated into plaintiff’s well. The court followed the *Brown case*\(^{12}\) explicitly; and, in doing so, said that it is only in an exceptional case that an owner will know beforehand that his works (use of his property) will affect his neighbor’s well or water supply. The court then concludes that, in the absence of both negligence and knowledge of the subterranean water-course, if the business is legitimate and operated with care and skill, there will be no liability for contamination. This decision has since been reaffirmed\(^{13}\) as the law of New York and presumably\(^{14}\) is still the law in that state today.

The history of this doctrine in Kentucky is quite interesting, in that the principle was at first rejected, and then, by subsequent decisions, adopted at least in effect. In its first decision on point, *Kinnaird v. Standard Oil Co.*,\(^{15}\) the court states that the owner of land, however innocent he might be, has no right to pollute or contaminate the water so that, when it reaches his neighbor’s land, it is in such a condition that it is unfit for use by either man or beast. In its next applicable case, *Long v. Louisville & Nashville R.R. Co.*,\(^{16}\) the court effectively

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9 It is to be especially noted that only the latter part of the holding of the supreme court is dicta.
12 *Supra*, note 4.
15 89 Ky. 468, 12 S.W. 937 (1890).
16 128 Ky. 26, 107 S.W. 203 (1908).
reverses itself by a very dubious distinction. Defendant had struck and killed a heifer, and had buried it on the right of way seventy feet from plaintiff's well. The well became polluted. The court said:

If the owner of the land may divert the water from his neighbor's well,\textsuperscript{17} it is hard to understand why he should be responsible in damages when, without fault on his part, he accidentally pollutes the water by burying a dead body on his own land without reason to suppose that the effect of this would be to pollute his neighbor's spring. The rule is elementary that a person is not liable for a mere accident which ordinary care on his part could not have anticipated or guarded against. If, in the lawful use of his property, a man accidentally does an injury to his neighbor which ordinary prudence would not have anticipated to result from his act, it is \textit{damnum absque injuria}. The law only requires of a man that in exercising his legal rights he shall exercise them with such regard for the rights of others as the circumstances demand of a person of ordinary prudence. There are a few cases in America following the rule laid down in \textit{Rylands v. Fletcher}, but the entire trend of modern authority is now the other way. . . . An accident is inevitable if the person by whom it occurs neither has nor is legally bound to have sufficient power to avoid it. In such a case the essential element of a legal duty is wanting; and it cannot be a case of negligence. Therefore no one can be made responsible for damages caused to another by an act which is strictly lawful under all the circumstances, unless he has been negligent in the manner of doing the act. We therefore conclude that a person who buries a dead body on his own land is not an insurer, and is not liable if his neighbor's spring is thereby polluted.

The Kentucky court has held that placing a privy within 150 feet of a well is not an act involving an anticipation of future damages,\textsuperscript{18} nor was the owner of a coal mining operation to anticipate that his escaping water would pollute a near-by well.\textsuperscript{19} In the latest case\textsuperscript{20} to come down in Kentucky, the doctrine of the \textit{Long} case\textsuperscript{21} is adhered to in principle, if not in name. Plaintiff's well became polluted with sulphur, and he charged defendant with permitting the escape of this sulphur. The court said that plaintiff could only recover upon negligence or nuisance. It found there was no negligence, as the defendant followed approved methods. The court then commented further on its "reasonable use" theory, rejecting the English rule of \textit{Rylands v. Fletcher} and

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\textsuperscript{17} It is to be noted in the Kinnaird v. Standard Oil Co. case, \textit{supra}, the court said, "There is a manifest distinction between the right of the owner of land to use the underground water that originates from percolation or is found in hidden veins and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor."
\textsuperscript{18} Davis v. Atkins, 18 Ky. L. R. 73, 35 S.W. 271 (1896).
\textsuperscript{19} North-East Coal Co. v. Hayes, 244 Ky. 639, 51 S.W.2d 960 (1932).
\textsuperscript{20} \textit{Supra}, note 1.
\textsuperscript{21} \textit{Supra}, note 16.
the doctrine that a landowner is an insurer of his neighbor's property; but declaring,

... in the absence of negligence there is no liability if there was a legitimate and reasonable use. The doing of a lawful thing in a careful and prudent manner cannot be a nuisance.

It would seem that Kentucky, therefore, is generally committed to the theory of *damnnum absque injuria* in ordinary pollution cases.22

Pennsylvania is another state to adopt this theory. Originally this jurisdiction allowed recovery in nuisance,23 but in an early case24 it was held that the plaintiff can hold the defendant liable only if the injury was plainly to be anticipated and easily preventable with reasonable care and expense. The latest case25 in that state reaffirmed the position:

Interference with subterranean waters seeping into private wells shall be treated as *damnnum absque injuria* where no negligence causing the injury is found.

The latest state to adopt this policy is Rhode Island.26 The well and stream of a farm became polluted by reason of defendant's storing and processing of petroleum on his land. The court in arriving at its decision denying recovery relied heavily upon public policy.

To give to others a right in such waters may subject a landowner to liability for consequences, arising from a legitimate use of his land, which he did not intend and which he could not foresee. If, in the process of refining petroleum, injury is occasioned to those in the vicinity, not through negligence or lack of skill or the invasion of a recognized legal right, but by the contamination of percolating waters whose courses are not known, we think that public policy justifies a determination that such harm is *damnnum absque injuria*.

Today the principle of *damnnum absque injuria* governs the problem of percolating water pollution in the states of Michigan,27 New York,28 Kentucky,29 Pennsylvania,30 and Rhode Island.31 They hold that the owner of property may use percolating waters beneath his surface for

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22 Unless there is absolute proof of causation, the case will not go to the jury. This is demonstrated in the case of Rogers v. Bond Brothers, 279 Ky. 239, 130 S.W.2d 22 (1939). Defendant operated the only tie plant in the general area in which creosote had polluted the water supply. The court said this, however, was merely circumstantial evidence and such was not sufficient to send the case to the jury.
23 Pottstown Gas Co. v. Murphy, 39 Pa. 257 (1861); Haugh's Appeal, 102 Pa. 42 (1883).
28 Supra, notes 13, 14.
29 Supra, note 20.
30 Supra, note 25.
31 Supra, note 26.
all purposes properly connected with the use, enjoyment and development of the land itself; but is forbidden to use it for purposes not connected with the beneficial enjoyment of the land.

There are some weaknesses in this doctrine, however. As was pointed out earlier, it is based upon dicta from a case not pertaining directly to percolating water. The logical adequacy of arguing that, because one has a right to withdraw all the water from the ground and therefore deprive a neighbor of his water, he also has a right to pollute and contaminate the water, is extremely suspect. The courts have also been guilty of sanctioning difference without distinction in applying opposite rules to percolating waters and underground streams. Insofar as Brown v. Illius constitutes the precedent for the damnum absque injuria decisions, it should be pointed out that the decision of that case is no longer law in Connecticut. In overruling the Brown case, the Connecticut court candidly stated that today percolating waters are distinguishable from the earth itself, and that modern science has erased the old mystery of how percolating waters are wont to move through the substratum. Changed knowledge prompts a changed rule of law.

B. RIGHT TO UNDEFILED WATERS—AFFIRMED

The right to recover for the pollution of percolating waters is based upon the English case of Ballard v. Tomlinson. This case held that while there is an unlimited right to use percolating water, contamination of such water so as to render it unfit for use when it comes onto a neighbor's land is a violation of the neighbor's rights for which an action can be maintained.

The states that have allowed recovery have held that there is a valid distinction between the right of the owner to use underground water and the right to contaminate it. As stated in Gilmore v. Royal Salt Co.: Some of the courts are very willing to assert that a landowner may maliciously deprive his neighbor of a water supply by pumping or draining it away, but at the same time they assert that he can not effect such deprivation by polluting the source of supply. It could not for a moment be conceded that there was a right to pollute the water, and the fact that there is no such

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32 It is upon this point that a strong concurring though dissenting opinion was written in Brown v. Illius, supra, note 4. As is stated in Rose v. Socony-Vacuum Corp., supra, note 26, "The rationale of these opinions is that the courses of subterranean waters are as a rule indefinite and obscure and, therefore, the rights relating to them can not well be defined as in the case of surface streams."
33 Supra, note 4.
34 Swift & Co. v. Peoples Coal and Oil Co., 121 Conn. 579, 186 Atl. 629 (1936).
35 24 Am. L. Reg. 634.
36 Supra, note 15.
37 84 Kan. 729, 115 Pac. 541 (1911).
right shows that the rights with respect to percolating waters are not absolute, but correlative, and that each landowner must, in using his own property, see that he does not injure his neighbor. A landowner will not be permitted to collect upon his premises injurious or offensive material in a place where it will be likely to find its way, by the action of percolating water, into his neighbor's well.

Such jurisdictions hold that whatever may be the rights of a landholder in either percolating water or defined and known subsurface streams, he cannot place anything in either which will pollute the springs or wells of his neighbors; and if he does, he is liable for the damages that result. A person has no right to befoul, corrupt or poison underground water, so that when it reaches his neighbor's land it will be unfit for use by either man or beast. This is good morals as well as good law.

Some courts derived the right to unpolluted percolating water by analogy. They say that the owner of the land has the same rights in the percolating water as he has to the use and enjoyment of the air that is around and over his premises. As it can scarcely be contended that a landholder can poison the atmosphere with noxious odors that reach the dwelling of his neighbor, so is it wrong to pollute the water underground.

Once the right to reasonable purity of percolating waters is postulated, the only remaining problem concerns the grounds on which the suit should be brought. We shall now review the four grounds chiefly relied upon in the decisions.

I. TRESPASS

At first glance the ground of trespass would seem to be a valid one on which to bring suit. It has been held that where one has filth deposited on his premises, he must take care to see that it does not trespass. And this rule will apply where the objectionable matter permeates the soil superficially and by action of the elements reaches the soil of another. This suggests that liability in this class of cases reaches the soil of another. This suggests that liability in this class of cases rests in trespass.

There have been only three cases in the field which expressly considered trespass as a possible basis for recovery. One of these is of little persuasiveness since liability was based primarily on a statute, and there is no discussion of the elements necessary for trespass. However, at least nominally, recovery was allowed upon a trespass theory. Of

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38 Killian v. Killian, 175 Ala. 224, 57 So. 825 (1912).
41 Tenant v. Goldwin, 1 Salk 360 (1705).
42 Supra, note 26.
the two cases remaining, one was in a state recognizing generally a right of action for pollution of percolating water and the other was not. Both denied recovery. In the former case the plaintiff's well became polluted and she sued the defendant, a filling station owner, on the grounds of case and trespass. There had been leakage from his underground storage tanks. There was sufficient evidence to sustain the action on the case but not on trespass. The distinction as drawn in this case between trespass and trespass on the case is in the directness or immediacy of the injury. An injury is considered immediate, and therefore a trespass, when it is directly occasioned by the act complained of and not merely a consequence resulting from it.

In the latter case the plaintiff had a well which became polluted with gasoline. A chemist stated that, in his opinion, the gasoline was of the same kind as the defendant sold and whose tanks were located 75 feet from plaintiff's well. In the original suit plaintiff charged defendant with nuisance, negligence and trespass. Later, plaintiff withdrew the charge of nuisance and negligence and relied solely upon trespass. In finding for the defendant the court held that trespass is an intentional harm; and while the trespasser need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces the unlawful invasion. The intrusion must either be the immediate or inevitable consequence of what he willfully does, or his act must be so negligent as to amount to willfulness. The court then goes on to reiterate the New York rule that defendant would not be liable even for deliberately placing the polluting material in the ground, unless it was proved that defendant had good reason to know or expect that the percolation of the subterranean waters would carry it to plaintiff's land.

It would appear from the two preceding cases that trespass is a valid ground for recovery only if the case falls within its rather strict limits. In the ordinary case, lawyerlike prudence would suggest basing the action for pollution of underground waters upon another and more firmly precedented ground.

II. NEGLIGENCE

The two most frequently accepted bases of relief for contamination of percolating water are negligence and nuisance. Of the two, negligence seems to be most favored by the courts. Two early cases in Massachusetts set up negligence as the basis of recovery for the pollution of wells. In the former the court held that if the water was rendered unfit for use by the negligent escape of defendant's gas, the

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45 Supra, note 14.
plaintiff might recover for the injury. In the latter case, the plaintiff had constructed a well in his cellar. The defendant next door constructed a vault in his barn and allowed manure to accumulate therein. Later, by percolation, plaintiff's well became polluted. The court held that the defendant was bound to construct his vault so that the contents should not percolate into plaintiff's well, and that such percolations were evidence of negligence upon which the plaintiff was entitled to recover. Negligence has since been found as basis for recovery in New Jersey for the accumulation of waste material on the land; in Illinois under a statute proscribing nuisance for escape of salt water; and in Alabama.

A plaintiff relying upon negligence as a basis of recovery in these cases, however, is often defeated by his inability to sustain his burden of proving the facts. He must prove the specific acts or omissions relied on to constitute the negligence, the causal connection with the injury, and the reasonable foreseeability of harm.

In Bollinger v. Mungle, the plaintiff lived across the street from defendant's filling station. Her well became polluted from his underground storage tanks. She was unable to show any actual negligence. The court held that to rely upon negligence she must prove negligence either in the original construction and installation of the gasoline tank and pump or by failure to repair or remedy defects in the equipment which were either known to him or by the exercise of ordinary care could have been discovered by him and remedied.

It is always a very difficult matter to prove the fact of negligence against a defendant when the property on which the alleged negligence occurs is entirely within his control. Because of this, some courts have

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49 Ballantine & Sons v. Public Service Corp. of New Jersey, 76 N.J. L. 358, 70 Atl. 167 (1908); Same case again—86 N.J. L. 331, 91 Atl. 95 (1914). The court held that a gas manufacturing company has not the right to use its works in the manufacturing of gas in such manner as to accumulate polluting matter upon its land, negligently allowing it to percolate through the soil and contaminating the well water of its neighbors. The owner of the soil has not an absolute right in his percolating water.
This was a case in which the defendant, lessee of the plaintiff, deposited salt water which later polluted the well of the lessor. The court held that the defendant was liable for this injury, not based upon nuisance as under the statute, but upon negligence.
51 Peerson Drilling Co. v. Scoggins, 261 Ala. 284, 74 So.2d 459 (1954). Plaintiff bought land with the mineral and mining rights excepted. Defendant, who owned these rights, while negligently drilling for oil, caused the water in plaintiff's well to become unfit for human consumption. The defendant raised the defense that the fee as owned by plaintiff had the mineral rights excepted, including the percolating water. If this were true, defendant would not be liable. The court held, however, that the term mineral and mining rights should be given its ordinary and common meaning, and so construed, plaintiff was not deprived of his right to the subterranean waters beneath the surface of his land.
52 175 S.W.2d 912 (Mo. 1943).
applied *res ipsa loquitur* as the basis of negligence. In *Texas Co. v. Giddings* the court held that where, from the nature of the case, the complainant would not be expected to know the exact cause or the precise negligent act, and where the facts are peculiarly within the knowledge of the defendant, it is sufficient in a general way to allege negligence. In another case the court found negligence because the gasoline storage tanks were under the supervision, maintenance and control of the defendant. In *Pine v. Rizzo* the court held:

Before the doctrine of *res ipsa loquitur* may be invoked to justify the inference of negligence on the part of the defendant, the plaintiff must prove what caused the damages and that the 'thing' causing said damage was under the control or management of the defendant or his servants, since the doctrine does not go to the extent of implying that one may, from the mere fact of injury, infer what physical act produced the injury.

Our discussion of the cases up to this point has not emphasized the difficulty of showing a causal connection between the original act and the resulting damage. However, this is a problem of proof which must be faced on whatever theory plaintiff elects to proceed. The difficulty of such proof became apparent in *Enders v. Sinclair Refining Co.*

Plaintiff had a well, located 675 feet from defendant's bulk plant, which became contaminated with petroleum. Defendant had lost by leakage 2500 gallons of petroleum in the preceding three year period. The plaintiff in his complaint charged defendant with having negligently permitted the petroleum products to escape from the storage tanks and to find their way into the well of the plaintiff. The court, in holding for the defendant, stated:

There is no preponderance of evidence of a causal connection between the loss of the petroleum products and the polluted well. Under some circumstances the plaintiff might establish his claim by a process of elimination. If there was no other place where petroleum products were kept or stored in or near the plaintiff's premises and it was established that after the escape of a large quantity of petroleum products upon the defendant's premises, plaintiff's well was polluted, there might be an inference that the escaped petroleum products had found their way to plaintiff's well from defendant's premises. The burden of showing that there was no other possible source of pollution was upon the plaintiff. The defendant was not required to prove that pollution from other sources did enter plaintiff's well, unless and until the plaintiff showed there was no other possible source of pollution.

Mere contamination of a well is not sufficient to establish causation.

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53 148 S.W. 1142 (Tex. 1912).
54 Sinclair Refining Co. v. Bennett, 123 F.2d 884 (1941).
55 186 Okla. 35, 96 P.2d 17 (1939).
56 220 Wis. 254, 263 N.W. 568 (1936).
57 Supra, notes 46, 51.
A causal connection has been denied where there are two possible sources.\textsuperscript{58} It requires some competent testimony to establish a relationship between the alleged source and the injury.\textsuperscript{59}

Causation is usually determined either by direct evidence or by inference. The usual method of establishing such fact by direct proof is to get a qualified person to deposit colored water, violent dye or potassium iodide into the suspected source; and, if it shows up in the polluted well,\textsuperscript{60} such fact will prove the source. While causation can be established inferentially by a process of elimination, the burden is on the plaintiff to eliminate all possible sources other than the defendant's premises.\textsuperscript{61} In one case, proof of the fact of actual pollution and of the direction of the percolation was held sufficient.\textsuperscript{62} Circumstantial evidence is sufficient to find causation;\textsuperscript{63} but recovery cannot be had by merely adding inference to inference or presumption to presumption; and the lack of evidence cannot be supplied by deduction.\textsuperscript{64} The nature of the surrounding circumstances may also give rise to an inference of causation.\textsuperscript{65} Obviously, the weight of such evidence is for the jury.\textsuperscript{66}

The final problem of proof is the question of foreseeability. It is upon this point that the minority of states which deny any right to unpolluted percolating water hold, as a matter of law, that a landowner cannot anticipate an injury from a lawful act. The reasoning of the majority on this point has seldom been discussed but it seems to be based upon two decisions. In one\textsuperscript{67} the court held that, under a typical set of facts, there was no pretense of a sudden and unavoidable accident which could not have been foreseen or guarded against by due care. The other case, referred to above, is \textit{Beatrice Gas Co. v. Thomas},\textsuperscript{68} in which plaintiff's well became polluted. Defendant had a condense well (dry well) on his property which was located 492 feet from the plaintiff's well. This condense well was to receive all the waste products from defendant's gas works. In this case the court stated:

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Defendant contends no action as he had no notice of the injury. We see no force in this contention. It is true some of the cases base the right to recover upon defendant's knowledge that he was committing the injury; but the injury was as great before as after notice. An action in tort is not a proceeding to punish a
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\textsuperscript{58} \textit{Supra}, note 1, 22.
\textsuperscript{59} \textit{Supra}, note 27.
\textsuperscript{60} Love v. Nashville Agricultural & Normal Institute, 146 Tenn. 550, 243 S.W. 304 (1922).
\textsuperscript{61} \textit{Supra}, note 56; Haveman v. Beulow, 36 Wash.2d 185, 217 P.2d 313 (1950).
\textsuperscript{62} Cities Service Gas Co. v. Eggers, 186 Okla. 1466, 98 P.2d 1114 (1940).
\textsuperscript{63} \textit{Supra}, note 39.
\textsuperscript{64} Shell Oil Co. v. Blubaugh, 199 Okla. 1353, 185 P.2d 959 (1947).
\textsuperscript{65} Hall v. Galey, 126 Kan. 699, 271 Pac. 319 (1928).
\textsuperscript{66} Sinclair Refining Co. v. Keister, 64 F.2d 537 (1933).
\textsuperscript{67} \textit{Supra}, note 48.
\textsuperscript{68} \textit{Supra}, note 6.
defendant for a willful act, but is to compensate the plaintiff for the invasion of his rights. It was not necessary, in order to constitute the pollution of the well a tort, that it should be done willfully. The most that can be said is that the defendant would not be liable for damages unless the injury was one which was the natural and probable consequence of those acts. While the defendant may not have known, and probably did not know, that its condense well would pollute the plaintiff's well, it was bound to know that the natural and probable consequence of collecting waste matter in its condense well would be the injury of some wells which might be connected with the condense well by the stratum of sand referred to.

Therefore the question whether or not one is well advised to prosecute his well pollution case on the ground of negligence will depend upon the amount of evidence he is able to procure on the factual issues of negligence, causation, and foreseeability.

III. NUISANCE

This theory of liability includes what is generally called nuisance in fact. It might be well to repeat at the outset that the same burden of proving causation attends the nuisance case as has been examined with respect to negligence.\(^6\)

This theory of recovery is established by numerous early cases. In *Brown v. Illius\(^7\)* Justice Ellsworth wrote a concurring opinion which has since become the law in Connecticut. He contended therein that one cannot use his land as to injure another, since such use is a nuisance and is one whether the source of injury be above or below the ground. The court in *Clark v. Lawrence\(^8\)* declared that a nuisance is an act which will produce irreparable mischief. Pennsylvania\(^9\) held a defendant was liable for the pollution of a well from substances left on the ground on a theory of nuisance. Kansas\(^10\) held that no one has a right to deposit refuse matter, whether in itself offensive or not, by which the water underlying his neighbor's land might become effected through percolation. Washington\(^11\) has held that the dumping

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\(^6\) Ozark Pipe Line Corp. v. Decker, 32 F.2d 66 (1929).

\(^7\) *Supra*, note 4.

\(^8\) 59 N.C. 83 (1860). The defendant was a trustee of a cemetery in which there had been at least two burials close to plaintiff's well. The water in the well became contaminated. Justice Battle wrote, "Whenever, then, it can be clearly proved that a place of sepulture is so situated, that the burial of the dead there, will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs, the court will grant its injunctive relief upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief, and one which cannot be adequately redressed by an action at law. . . . (1)n a case like the present . . . the thing complained of is certainly of the character of a nuisance."

\(^9\) *Supra*, note 23.

\(^10\) *Supra*, note 37.

of waste water into a sump, so as to pollute a neighbor's well by percolation, is a nuisance.

The courts which follow the nuisance theory in pollution cases apply a kind of reverse reasoning. First they say that the owner of land is entitled to the use of water in a well thereon in its natural state; and that adjoining landowners have no right to limit the owner's use thereof. They then determine whether there has been material pollution by percolation of the defendant's wastes into the well of an adjoining landowner. Such a result is declared a nuisance for which the defendant is liable. Liability stems from the type of damage.

One court has summarized it:

It is a well-settled law that if a person renders the water of another impure by filth, offal or other substance to his injury, he thereby creates a nuisance under ... the common law.

The fact that such pollution may constitute a public (or widespread) nuisance is no bar to recovery. It is not necessary that plaintiff alone be affected. It is sufficient that he belongs to a class specially affected by the pollution, and whose damages differ not only in degree but also in kind from those of the public generally.

Concededly, there is a narrow distinction in this field between negligence in the act and nuisance in the result. The problem has been placed before the courts, and they have not been without an answer. One court has said:

There is a wide distinction between acts lawful in themselves, done by one upon his own premises, which may result in injury to another if not properly done or guarded, and those which in the nature of things must so result. In the former case a party can only be made liable for actual negligence in the performance of the act while in the latter he would be liable for all the consequences of his acts, whether guilty of negligence or not. ... Negligence is a failure to use the degree of care required under the particular circumstances involved; whereas nuisance does not rest on the degree of care used, but on the degree of danger existing with the best of care. (emphasis supplied.)

Negligence requires that a defendant must have either acted or failed to do so when an ordinary reasonable man would realize that certain interests were subject to a definite class of risks. Otherwise, legal duty is defeated. Notice, then, becomes a necessary element in certain cases where injury is produced from acts lawful in themselves

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75 Danciger Oil & Refining Co. v. Donahery, 209 Okla. 1390, 238 P.2d 308 (1951).
76 Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 So. 593 (1889).
77 Supra, note 44.
78 Supra, note 60.
80 Supra, note 52.
81 FROSSER, TORTS, §31; HARPER, LAW OF TORTS, §111.
and without an indication of the ultimate results. This gives rise to a proximate causal relationship between the act and the result, and is a foreseeable consequence of the act.\textsuperscript{82} There is a distinction, however, between negligence and nuisance as to notice.\textsuperscript{83} To require a notice before one can maintain a cause of action for nuisance is to destroy both the cause of action and the principle upon which recovery is founded. To require notice before there is injury, in such a case, is to give no relief to a well so polluted.\textsuperscript{84} Since, in many jurisdictions, as has been shown, the percolation of filth into the plaintiff's premises would constitute a nuisance, it is not necessary to prove negligence on the part of the defendant.\textsuperscript{85}

In considering nuisance as a basis of liability for the pollution of a well by percolation, the plaintiff will realize that his burden is to prove the elements of nuisance. In sustaining this burden the plaintiff must base his case upon the fact that the defendant is maintaining a nuisance and that the nuisance is the cause of the damage. The court looks to the damage and the cause of it, and not to the acts producing it.

IV. Strict Liability

The last category is sometimes called nuisance per se. This theory is based upon the English case of \textit{Rylands v. Fletcher}.\textsuperscript{86} The doctrine is summed up in the statement that:

The person whose grass or corn is eaten down by escaping cattle of his neighbours, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damned without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it get on his neighbour's, should be obligated to make good the damage which ensues if he does not succeed in confining it to his own property.

In \textit{Berry v. Shell Petroleum Co.}\textsuperscript{87} the Kansas court applied this doctrine to percolating waters. This decision is based, not upon the statute involved, but (even in its absence) upon the defendant having the harmful substance on his land and permitting it to escape to the damage of the plaintiff. Once the salt water left the vicinity of the defendant, he became liable for whatever damage resulted from its escape.

\textsuperscript{83} \textit{PROSSER, supra}, note 81, §71.
\textsuperscript{84} \textit{Supra}, note 15.
\textsuperscript{85} \textit{Supra}, note 34; \textit{HARPER, supra}, note 81, §183.
\textsuperscript{86} \textit{L. R. 1 Ex. 265} (1866).
\textsuperscript{87} 140 Kan. 94, 33 P.2d 953 (1934).
In another case the defendant stored oil in an underground tank, which escaped, and later polluted plaintiff's well. The court, in following *Rylands v. Fletcher*, said that the essential condition of liability, without any proof of negligence on the part of the owner, for the injury caused to others by the escape of things kept by him on his premises, is that the natural tendency of the thing is to become a nuisance or to do mischief, if it does escape.

One other factor can be considered under this category. It has been held that the collection and impounding of a substance in an artificial container, along with an escape and a percolation upon the property of another without negligence, made defendant liable for the resultant damage. This idea has been carried over to include privies. One such court held that a privy is regarded as a prima facie nuisance, even though necessary and indispensible for the ordinary purposes of habitation, if it is allowed to annoy others in the proper enjoyment of their property, by reason of the escape of filthy matter onto the premises of another, so as to corrupt the water of a well or spring. The rule of law that pertains to a privy is easily adaptable to a septic tank by analogy.

As has been seen, this is by far the easiest theory upon which to base liability for the contamination of a well. The defendant becomes liable by the mere fact of the pollution. It is to be noted that nineteen states have accepted *Rylands v. Fletcher* and eleven have rejected it. However, only two jurisdictions have expressly based liability for the pollution of a well upon the doctrine of *Rylands v. Fletcher*. Therefore, the actual value of this theory at present, as a basis for recovery, is doubtful.

There is one other possible solution to the problem of the corruption of a well by percolation. Some states have met the need for the preservation of a pure water supply by setting up regulations to protect percolating water from infiltration. In such a case, liability can be based strictly upon the statute. However, this has not been a widespread practice.

There is one other aspect found in every case for the pollution of a well that deserves special mention. Usually, the plaintiff will desire to recover damages. If such is the case, the court will follow the general rule and give him the difference between the value of the property before the injury and the value after the injury. The amount of

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88 Berger v. Minneapolis Gaslight Co., 60 Minn. 296, 62 N.W. 336 (1895).
89 Supra, note 53.
90 Wahl v. Reinbach, 76 Ill. 322 (1875).
92 Generally, such statutes provide liability in broad terms. Rather than being specific, they give a supervisory power over the water supply to a board or commission.
93 For a discussion of this subject, see 19 A.L.R.2d 769.
recovery will rise or fall depending upon the degree of permanency of the injury. However, in some cases, the injured party will seek an injunction rather than damages. An injunction is not granted if the injury is permanent, as then there is no need for it. The court determines permanency upon the facts of each case. Thus an injunction, with or without damages, is sought only where there is a temporary contamination of a well with a threat of continuation in the future. If an injunction is sought simply in anticipation of possible future contamination, the court will refuse relief unless it is reasonably clear, definite and certain, that the well will become contaminated from the defendant's filth. If the result is doubtful, the injunction will be denied.

C. Conclusion

The first question that is raised in a well case is whether the right to undefiled water is protected. If the right is not protected, the injury is considered damnuni absque injuria, unless the plaintiff is able to show that the defendant knew of the underground water supply and knew of the damage that would result from his placing the material so as to injure his neighbor's well. Because of this burden, recovery is extremely rare in states following such a theory.

If, on the other hand, the jurisdiction affirms the right to undefiled water, the next problem is that of selecting an appropriate ground upon which to base recovery. The difficulty of relying upon trespass has been demonstrated. Negligence, while a valid basis, gives rise to difficulty in sustaining the burden of proof, since both the acts and the instrument that caused the injury are wholly within the control of the defendant. Nuisance has certain advantages, as, it is only necessary to show that a well has been polluted, and that defendant has maintained the nuisance that has caused the pollution to recover on that ground. Strict liability makes the proof of a nuisance almost a matter of fact; but to date, only two states have expressly accepted this doctrine as applied to the pollution of a well. Because of the inherent difficulties in the other grounds, nuisance appears to promise the greatest likelihood of success in pollution cases.

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94 Supra, note 75.